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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JAMES THOMAS BABAKITIS, Defendant and Appellant.	B279617 (Los Angeles County Super. Ct. No. KA109577)
In re JAMES THOMAS BABAKITIS on Habeas Corpus.	B286000

APPEAL from a judgment of the Superior Court of Los Angeles County, Mike Camacho, Judge. Judgment of conviction

affirmed; sentence vacated and remanded for further proceedings. Petition for writ of habeas corpus denied.

Susan Morrow Maxwell, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Margaret E. Maxwell and Douglas L. Wilson, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant James Thomas Babakitis of misdemeanor assault upon a peace officer, felony resisting an executive officer, and felony assault on a peace officer with a deadly weapon or by means of force likely to produce great bodily injury. Babakitis appeals, contending (1) the trial court prejudicially erred by admitting evidence of the circumstances of two of his prior convictions; (2) denial of his *Romero* motion was an abuse of discretion;[1] (3) the matter must be remanded to allow the trial court to exercise its discretion to strike or dismiss a prior serious felony conviction in light of recently enacted Senate Bill No. 1393; and (4) a clerical error in the abstract of judgment must be corrected. In his appeal, and in a petition for writ of habeas corpus that we consider together with the appeal, Babakitis contends the trial court violated his due process rights by imposing a vindictive sentence. We order Babakitis's sentence vacated and the matter remanded to allow the trial court to exercise its discretion pursuant to Senate Bill No. 1393, and for correction of the abstract of judgment. In all other respects, the

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[1] *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

judgment of conviction is affirmed. The petition for writ of habeas corpus is denied.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts*

a. *People's evidence*

On February 19, 2015, uniformed Los Angeles County Sheriff's Deputies David Swanson, Catarino Gonzales, Pedro Echeverria, Hilbrand Goedhart, and Tim Hauser were on mounted patrol in Lario Park in Azusa. As part of their duties, they routinely checked parked vehicles for illegal activity. The park was a high crime area and was known for drug and weapons activity.

At approximately 2:10 p.m., the deputies observed a white Toyota parked in an isolated, dirt parking area. They found the car's location suspicious; it was parked away from the park's amenities, in an area where there was nothing but dirt and brush. The deputies decided to investigate. As they approached, they saw Babakitis exit the Toyota, appear to place something in the trunk, and then return to the driver's seat. Gonzales, Echeverria, and Hauser saw that Babakitis was smoking a cigarette. The park was a "high fire" area, and smoking there was a misdemeanor violation of the county code.

Gonzales and Echeverria dismounted and approached Babakitis. Swanson and Goedhart, still on horseback, positioned themselves in front of Babakitis's car. Echeverria asked Babakitis to turn off the engine and step out; he complied. Echeverria began to tell Babakitis that smoking in the park was a code violation. Gonzales decided to pat Babakitis down for weapons. He informed Babakitis that he would do so, and explained the procedure. When Gonzales commenced the pat

search, Babakitis struck Gonzales in the chest with his elbow, struggled with him, and reentered the Toyota. Gonzales and Echeverria grabbed Babakitis and attempted to pull him out of the car, holding on to his arms, shoulder, clothing, and long ponytail. His shirt ripped off in the process. Babakitis started the car and ignored the deputies' commands to cease resisting and turn off the engine.

Goedhart and Swanson, observing the struggle, cantered their horses toward the Toyota. Swanson, Gonzales, and Echeverria saw Babakitis reach beneath the driver's seat. Afraid he was reaching for a weapon, Swanson pointed his gun at Babakitis and yelled, " 'Don't do it. I will shoot.' " Babakitis brought his hand up from beneath the seat, without a weapon. He placed the car in gear, revved the engine, and "floored it." The vehicle's tires spun and made gouges in the dirt, but initially failed to gain traction. Babakitis held on to Gonzales's arm, pinning it between his arm and chest. Afraid that Gonzales would be dragged by the car or fall underneath it, Swanson again yelled to Babakitis, "Don't do it!" When the car began moving, Swanson fired one round, hitting the passenger side window and mirror. Gonzales, still pinned, stumbled, walked several steps along with the moving car, and then came free; had he fallen, the vehicle would have hit him. Babakitis sped off, hitting Echeverria's gun belt and knee, causing him to fall.

Gonzales was not injured. Echeverria suffered a sprained right knee, bruising to his left knee, and a cut on his right thumb. He was treated at a hospital emergency room, and was off work for two to three days as a result.

(i) *The investigation*

Based on a tip, Deputy Max Fernandez identified Babakitis as a suspect in the incident. Fernandez learned that the white Toyota belonged to Babakitis's friend, Lani Criswell. When he located the car, there were cigarette butts inside. When deputies interviewed Babakitis, he denied involvement in the incident.

A friend of Criswell's overheard a conversation between Criswell and Babakitis, and later spoke to Babakitis herself. Babakitis stated he had been attacked by deputies on horseback; he thought someone might have "ratted him out"; he had hit one of the deputies; and one of the deputies mentioned seeing smoke. On the day of the incident, the friend saw Babakitis leave in Criswell's Toyota with Randy Clark, who later called and asked why Babakitis had not picked him up.

(ii) *Prior misconduct*

The People presented evidence, pursuant to Evidence Code section 1101, subdivision (b), of two prior incidents in which Babakitis resisted or evaded peace officers.

On the afternoon of December 23, 2008, Los Angeles County Sheriff's Department Sergeant Henry Saenz saw Babakitis driving a pickup truck recklessly. Saenz activated his patrol vehicle's lights and siren to effectuate a traffic stop, but Babakitis accelerated and drove away. Saenz chased Babakitis to a dead end street. Babakitis turned the truck around, looked directly at Saenz, "peel[ed] out," and drove directly towards Saenz's patrol vehicle. Saenz maneuvered out of the way, but the truck came within 10 feet of the patrol car. In the ensuing pursuit, Babakitis almost hit another patrol car, ran red lights and stop signs, and drove at high speed on the freeway's shoulder.

On the evening of June 20, 2014, Glendora Police Department Officer Craig Voors stopped Babakitis, who was driving a Dodge Caravan and did not have a valid driver's license, for a vehicle code violation; Officer Scott Salvage provided backup. Babakitis gave Voors false identifying information. After Voors directed Babakitis to exit the van, Babakitis became argumentative. He attempted to reach into his pocket, saying he wanted to get a phone charger for his passenger; he ignored Voors's command to keep his hands out of his pockets. Voors and Salvage grabbed and struggled with Babakitis. Babakitis grabbed Voors's microphone, making it impossible for him to call for help. Salvage punched Babakitis. The officers eventually subdued him. The encounter was recorded by the officers' dashboard cameras, portions of which were played for the jury.

b. *Defense evidence*

Babakitis testified in his own behalf. He admitted suffering four prior felony convictions for possession or transportation of controlled substances for sale; two prior felony convictions for possession of a firearm; and one prior conviction for residential burglary. He was also convicted of evading a police officer with wanton disregard for safety, based on the 2008 incident, and battery on a peace officer, based on the 2014 incident.

Babakitis explained he had borrowed Criswell's vehicle to drive Clark to Lario Park. Upon arrival, Clark directed Babakitis to an area near a dirt trail, retrieved his bicycle from the trunk, said he would be back in a few minutes, and rode down the trail. Babakitis checked that the trunk was properly closed

and reentered the car, waiting for Clark's return. He was not smoking.

When the deputies approached, he complied with the order to turn off the engine and step out of the car. Without explanation or warning, Deputy Gonzales suddenly came up from behind and twisted and pulled Babakitis's wrists. Gonzales did not explain he was going to do a pat search, and neither deputy told him why they were accosting him. When the deputies began to push him to the ground, Babakitis tried to get back in the car, intending to lock it and protect himself from what he perceived to be an unprovoked attack. Gonzales repeatedly punched him in the head. Since the "locking out" tactic was not working, Babakitis decided to simply drive away. After several attempts, he started the engine. Someone screamed from the passenger side of the car, " 'I'm gonna blow your fuckin' head off.' " A gunshot rang out and the passenger side window exploded. Babakitis drove away; none of the deputies was near the car at that point. He denied elbowing Gonzales. He did not intend to flee until the deputies began beating him and shot out the window.

Regarding the 2014 incident, Babakitis admittedly gave his brother's name to officers because his license was expired. He resisted because he was scared of the officers and was afraid they would force him to the ground and he would hit his head. He had a "flashback" to the 2014 incident during the 2015 incident.

As to the 2008 incident, Babakitis testified that the deputy attempted to stop him for no reason, scaring him; he fled because he did not have a valid license; and he did not drive toward the officer's vehicle, and was never close to it.

Babakitis admitted he had been arrested many times and knew what he should do when contacted by police. He also knew that reaching into his pocket or under a seat would be perceived by officers as dangerous.

c. *People's rebuttal*

Deputy Gonzales denied punching Babakitis. Photographs taken shortly after the incident showed Gonzales had no injuries to his hands.

An audio recording of the 2014 incident in some respects supported the deputies' account of the incident and contradicted Babakitis's story.

2. *Procedure*

The jury convicted Babakitis of two counts of resisting an executive officer engaged in the performance of his duties (Pen. Code, § 69);[2] assault on a peace officer, Gonzales, with a deadly weapon or with force likely to produce great bodily injury (§ 245, subd. (c)); and misdemeanor assault on a peace officer, Echeverria (§ 241, subd. (c)), a lesser included offense of assault with a deadly weapon or with force likely to produce great bodily injury. Babakitis admitted suffering a prior conviction for first degree burglary, a serious or violent felony (§§ 667, subds. (a), (b)—(i), 1170.12, subds. (a)—(d)), and serving nine prior prison terms within the meaning of section 667.5, subdivision (b).

The trial court denied Babakitis's *Romero* motion but struck four of the prior prison term allegations. It sentenced him pursuant to the Three Strikes law to an aggregate term of 23 years 4 months for the instant matter and an unrelated case. It

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[2] All further undesignated statutory references are to the Penal Code.

imposed a restitution fine, a suspended parole revocation restitution fine, a court operations assessment, and a criminal conviction assessment.

DISCUSSION

1. *The trial court did not err by admitting evidence of Babakitis's prior misconduct*

Babakitis contends the trial court erred by admitting evidence of the 2014 and 2008 incidents in which he resisted or evaded peace officers. He argues that the evidence was relevant only as character evidence, i.e., to show his propensity to commit the offenses, and should have been excluded under Evidence Code sections 1101, subdivision (a) and 352.

a. *Additional facts*

Prior to trial, the prosecutor moved to admit the evidence pursuant to Evidence Code section 1101, subdivision (b), to prove, inter alia, motive, intent, and common plan or scheme. Defense counsel argued that the 2008 incident was too dissimilar to the charged offense and both incidents were unduly prejudicial and should be excluded under Evidence Code section 352. The trial court found the prior incidents admissible because they were relevant and probative on the issue of motive. The central issue in the case, the court reasoned, was whether Babakitis was attempting to avoid apprehension by using force, or whether he was simply reacting to what he perceived as excessive force by the deputies. The court later determined the evidence could be considered on the issues of knowledge and common scheme or plan. The court gave a limiting instruction regarding the prior crimes evidence.

b. *Applicable legal principles*

Evidence that a defendant committed misconduct other than that currently charged is inadmissible if the *only* theory of relevance is that the evidence shows the defendant had a bad character, a criminal disposition, or a propensity to commit the charged crime. (Evid. Code, § 1101, subd. (a); *People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 405–406; *People v. Rogers* (2013) 57 Cal.4th 296, 325.) However, such evidence is admissible if it is relevant to prove, among other things, motive, intent, knowledge, or the existence of a common design or plan. (Evid. Code, § 1101, subd. (b); *People v. Bryant, Smith and Wheeler*, at p. 406; *People v. Jones* (2011) 51 Cal.4th 346, 371; *People v. Spector* (2011) 194 Cal.App.4th 1335, 1373.) "To be admissible, there must be some degree of similarity between the charged crime and the other crime, but the degree of similarity depends on the purpose for which the evidence was presented." (*People v. Jones*, at p. 371.) "The least degree of similarity between the uncharged act and the charged offense is required to support a rational inference of intent; a greater degree of similarity is required for common design or plan; the greatest degree of similarity is required for identity." (*People v. Gutierrez* (2018) 20 Cal.App.5th 847, 859.)

Even if other crimes evidence is admissible under Evidence Code section 1101, subdivision (b), it should be excluded under Evidence Code section 352 if its probative value is substantially outweighed by undue prejudice. (*People v. Bryant, Smith and Wheeler*, *supra*, 60 Cal.4th at pp. 406–407; *People v. Thomas* (2011) 52 Cal.4th 336, 354.) " ' " 'Prejudice' as contemplated by [Evidence Code] section 352 is not so sweeping as to include any evidence the opponent finds inconvenient. Evidence is not

prejudicial, as that term is used in [an Evidence Code] section 352 context, merely because it undermines the opponent's position or shores up that of the proponent.' " ' " (*People v. Scott* (2011) 52 Cal.4th 452, 490–491.) We review a trial court's rulings on relevance and admission of evidence under Evidence Code sections 1101 and 352 for abuse of discretion. (*People v. Jones*, *supra*, 51 Cal.4th at p. 371; *People v. Ghebretensae* (2013) 222 Cal.App.4th 741, 754.)

c. *Admission of the prior incidents was not error*

To prove the charged offenses of assault and resisting an executive officer, the People had to establish that the deputies were lawfully performing their duties when they detained Babakitis, and that Babakitis knew or reasonably should have known this. (*People v. Atkins* (2019) 31 Cal.App.5th 963, 973–974; *People v. Hendrix* (2013) 214 Cal.App.4th 216, 237; *People v. Rasmussen* (2010) 189 Cal.App.4th 1411, 1421.) The jury was instructed that a peace officer is not lawfully performing his duties if he unlawfully arrests or detains someone or uses unreasonable or excessive force, and that an arrestee may use reasonable force to protect himself from such excessive force. Babakitis's defense was that the deputies attacked him without warning, and he acted simply to protect himself from their unlawful attack. Thus, as the trial court reasoned, Babakitis's intent was at issue: the crucial question for the jury was whether Babakitis was using force because he wished to avoid apprehension, or whether he was reacting to perceived excessive force.

People v. Spector is instructive. There, the victim accompanied the defendant, Spector, to his home for a drink. Spector was alone with the victim later that morning when she

was shot and killed. Charged with her murder, Spector's defense was that she committed suicide, or accidentally shot herself, with his gun. (*People v. Spector*, *supra*, 194 Cal.App.4th at pp. 1375–1376.) At trial, five women testified to seven incidents in which Spector had violently assaulted them with guns when they attempted to leave his residence or hotel room against his wishes. (*Id.* at pp. 1342–1343, 1354–1358.) We concluded the prior crimes evidence was properly admitted to prove Spector's motive and show the victim did not shoot herself. (*Id.* at pp. 1343, 1374.) Because the evidence showed Spector repeatedly became angry, lost control, and assaulted women with firearms when they tried to leave, the jury could permissibly infer that he similarly lost control and shot the victim in the charged crime. (*Id.* at pp. 1383–1384.) The evidence was also relevant "because of a principle known as the 'doctrine of chances.' " (*Id.* at p. 1377.) The doctrine of chances " 'teaches that the more often one does something, the more likely that something was intended, and even premeditated, rather than accidental or spontaneous.' " (*Id.* at p. 1380.)

Here, the prior crimes evidence showed Babakitis repeatedly refused to allow himself to be taken into custody or stopped by officers. From this, the jury could infer he struggled with and fled from the deputies due to his desire to avoid apprehension, rather than because of a perception that they were using excessive force. (See *People v. Simon* (1986) 184 Cal.App.3d 125, 127, 130 [other crimes evidence tending to negate a defendant's claim of self-defense is admissible under Evid. Code, § 1101, subd. (b)]; *People v. Demetrulias* (2006) 39 Cal.4th 1, 14–15 [prior assault and robbery tended to show that the defendant stabbed current victim to take his money rather

than to defend himself]; *People v. Zankich* (1961) 189 Cal.App.2d 54, 66 [evidence defendant committed unprovoked assaults on two strangers within hours of charged assault was properly admitted as tending to prove a lack of provocation for the charged assault].) Based on the doctrine of chances, the fact Babakitis repeatedly engaged in similar evasive behavior made it more likely he acted with the intent to avoid apprehension. (See *People v. McCurdy* (2014) 59 Cal.4th 1063, 1096 [the " ' "recurrence of a similar result . . . tends (increasingly with each instance) to negative . . . self-defense or good faith or other innocent mental state" ' "]; *People v. Jones*, *supra*, 51 Cal.4th at p. 371; *People v. Steele* (2002) 27 Cal.4th 1230, 1244; *People v. Spector*, *supra*, 194 Cal.App.4th at p. 1380.) The evidence therefore was probative to disprove Babakitis's contention that his conduct was motivated by a desire to avoid the deputies' use of excessive force, rather than to avoid apprehension.

The evidence was not unduly prejudicial under Evidence Code section 352. Because a motive is ordinarily the incentive for criminal behavior, its probative value generally exceeds its prejudicial effect. (*People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1550.) The prior incidents were no more inflammatory than the charged crimes. (See *People v. Eubanks* (2011) 53 Cal.4th 110, 144 [potential for prejudice is decreased when uncharged acts are no more inflammatory than the charged offenses].) The court gave a limiting instruction advising that the prior crimes evidence could be considered only on the issues of motive, knowledge, or plan or scheme, and for no other purpose. The instruction specifically required that the jury "not conclude from this evidence that the defendant has a bad character or is disposed to commit crime." We presume the jury followed this

instruction, which mitigated the potential for prejudice. (*People v. Jones*, *supra*, 51 Cal.4th at p. 371; *People v. Foster* (2010) 50 Cal.4th 1301, 1332.) And, the fact the jury knew Babakitis had been convicted in both prior incidents further reduced any prejudicial effect, as it would not be tempted to convict to punish Babakitis for the prior crimes. (*People v. Jones*, at p. 372; *People v. Steele*, *supra*, 27 Cal.4th at p. 1245.)

People v. Hendrix, cited by Babakitis, is distinguishable. There, the defendant—charged with resisting an executive officer—contended he mistook the officer for a security guard, because he had fought with a security guard earlier that evening, his vision was blurred by pepper spray, the lighting was poor, and he was intoxicated. (*People v. Hendrix*, *supra*, 214 Cal.App.4th at p. 240.) The People introduced evidence of two prior incidents in which the defendant had unlawfully resisted officers as proof he knew the victim was an officer engaged in his duty. (*Ibid.*) A divided appellate panel held the evidence lacked probative value because the prior incidents did not involve security guards and did not prepare defendant to distinguish between security guards and police officers. (*Id.* at pp. 243–244.) It was also cumulative, because any "police-related knowledge defendant purportedly gained" from the prior incidents was "common knowledge," i.e., that in the course of duty, officers give verbal commands and use force to arrest noncompliant persons. (*Id.* at p. 244.) The evidence was prejudicial, because it included irrelevant information about the defendant's post-arrest threats to officers. (*Id.* at pp. 245–246.) Here, in contrast, the issue was not whether Babakitis knew the deputies were peace officers; the question was whether he resisted because he did not wish to be detained, or because the deputies engaged in an unlawful attack

on him. For the reasons we have discussed, on this question, the prior crimes evidence was probative. Moreover, the evidence did not include prejudicial, irrelevant information akin to the "threat" evidence introduced in *Hendrix*.

To the extent Babakitis intends to argue any dissimilarity between the prior and current crimes rendered the evidence inadmissible, we disagree. The 2014 and 2015 incidents were quite similar: in both, Babakitis became argumentative when he was ordered out of the vehicle, tried to reach into a pocket or under the seat, and struggled with deputies who attempted to restrain him. In the 2008 offense, as in the charged crimes, Babakitis attempted to use his vehicle to assault officers. In all three incidents, he used force to resist rather than allow himself to be detained or arrested. The 2008 incident was dissimilar in the sense that the officer did not physically struggle with Babakitis. But "the probativeness of other-crimes evidence on the issue of motive does not necessarily depend on similarities between the charged and uncharged crimes, so long as the offenses have a direct logical nexus." (*People v. Demetrulias*, *supra*, 39 Cal.4th at p. 15.) The crimes need only be sufficiently similar to support an inference that defendant probably harbored the same intent in each instance. (*Ibid.*) That requirement was satisfied here. The circumstances were sufficiently similar to support the inference that a desire to evade peace officers motivated Babakitis in each instance. (See *People v. Jones*, *supra*, 51 Cal.4th at p. 371 [charged and prior robberies were "not particularly similar, but they contained one crucial point of

similarity—the intent to steal from victims whom defendant selected"].)[3]

Finally, there is no merit to Babakitis's contention that the evidence lacked probative value because the other evidence presented by the People, if credited by the jury, "would clearly prove the crimes alleged." A prosecutor is "entitled to present as forceful a case [as] he [or she] could with the evidence that he [or she] had." (*People v. Clark* (2016) 63 Cal.4th 522, 586 [rejecting argument that admission of allegedly prejudicial evidence was unnecessary because the point for which it was offered could have been proven by other evidence]; *People v. Scott*, *supra*, 61 Cal.4th at p. 399; *People v. Zankich*, *supra*, 189 Cal.App.2d at p. 61.)

2. *Sentencing issues*

In his appeal and his petition for writ of habeas corpus, Babakitis argues that the trial court vindictively sentenced him to a term in excess of the People's pretrial plea offer to penalize him for exercising his right to a jury trial. In his direct appeal, Babakitis contends the trial court abused its discretion by denying his *Romero* motion. In supplemental briefing, he argues that the matter must be remanded to allow the trial court to exercise its discretion to strike or dismiss a prior serious felony enhancement in light of recently enacted Senate Bill No. 1393. Both parties agree that the abstract of judgment must be amended to correct a clerical error.

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[3] In light of our conclusion that admission of the evidence was not error, we do not reach the parties' arguments regarding prejudice.

a. *Additional facts*

According to the declaration of attorney Allan Gonzalez, who initially represented Babakitis, prior to the preliminary hearing the People offered a plea deal of six years in exchange for Babakitis's plea to one count of assault on a peace officer with a deadly weapon.[4] Babakitis indicated he wanted to think about the offer. Before the preliminary hearing, a new, unrelated case was filed against Babakitis. The People withdrew the six year offer and made a new 11 year offer, which Babakitis rejected. Approximately seven months after the preliminary hearing, the People filed an amended information which added two section 667.5, subdivision (b) prior prison term allegations.

Before the jury was empanelled, the trial court inquired about the parties' attempts to resolve the case. The prosecutor stated that the People's last offer had been 14 years 4 months to resolve both cases, an offer Babakitis rejected. The trial court informed Babakitis: "you need to understand the People generally will make generous offers at a very early stage in the case, which means that they do not need to put in the time and work necessary to prep a case for trial. Now that the People have put in those efforts, it's very unlikely that they would even re-offer the 14 years 4 months, which was made at an earlier stage; but in the event . . . they decided to renew it, I guess my question will be to counsel here . . . would your client be interested in resolving both cases for the determinate term of 14 years 4 months?" Defense counsel said no. The court stated that, in light of Babakitis's decision and the unlikelihood the People would

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[4] We assume the factual allegations in the declaration and petition are true. (See *In re Figueroa* (2018) 4 Cal.5th 576, 587.)

renew the offer, settlement negotiations were at an end. It stated, "I'm hoping you made the right decision."

After the jury's verdict, Babakitis filed a *Romero* motion, which the prosecutor opposed. Babakitis argued that the prior strike, a residential burglary, was remote, having been suffered in 1988, when he was 22 years old. He acted as the getaway driver and did not enter the residence; no one was home; and the stolen property—which was of low value—was returned to the owners. While acknowledging that his criminal record was "relatively extensive," he argued that his prior crimes were nonviolent, primarily drug-related, and had not increased in seriousness over the years. The charged offense was the result of his "unique and troubling experiences" with law enforcement officers, whom he believed intended him harm. Given his age, 51, a three strikes sentence was akin to a life term. He presented numerous letters from family and friends in support of the motion.

After considering the nature and circumstances of the present offense, the prior strike, and Babakitis's background, character, and prospects, the trial court denied the *Romero* motion. It observed that Babakitis's criminal history amounted to "a couple of decades of consistent, continuous criminal activity," and all prior punishments had had no rehabilitative effect. The court concluded it would "be nearly irresponsible to strike that strike" and would be "beyond an abuse of discretion."

The court imposed an aggregate sentence of 23 years 4 months for both the instant matter and case No. KA110099, configured as follows: on count 3, assault on a peace office with a deadly weapon or with force likely to produce great bodily injury, the upper term of five years, doubled pursuant to the Three

Strikes law, plus five years for the section 667, subdivision (a)(1) serious felony enhancement, and one year for each of the remaining five section 667.5, subdivision (b) prior prison term enhancements; on count 4, resisting an executive officer, a consecutive term of one year four months (one third of the mid-term of two years, doubled pursuant to the Three Strikes law); and an additional two years consecutive for Babakitis's conviction by plea in case No. KA110099 for possession of a controlled substance for sale (Health & Saf. Code, § 11378, subd. (a)).[5] The court explained it selected the high term on the base count because the crime involved violence or the threat of great bodily injury to the deputy; Babakitis's actions showed a high degree of cruelty and viciousness; his conduct indicated he was a serious danger to society; his prior convictions were numerous and of increasing seriousness; he had served prior prison terms; he was on probation at the time he committed the present offense; his prior performance on probation and/or parole was unsatisfactory; and there were no mitigating factors.

b. *Babakitis has failed to establish the sentence imposed was vindictive*

Babakitis contends the trial court imposed a sentence exceeding the pretrial plea offers to impermissibly penalize him for exercising his right to a jury trial, in violation of his state and federal due process rights. We disagree.

Penalizing a defendant for exercising his or her right to a jury trial violates due process. Therefore, a court " 'may not treat a defendant more leniently because he foregoes his right to trial

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[5] The court stayed sentence on counts 1 and 2 pursuant to section 654.

or more harshly because he exercises that right.' [Citation.]" (*In re Lewallen* (1979) 23 Cal.3d 274, 278-279 (*Lewallen*); *People v. Collins* (2001) 26 Cal.4th 297, 306–307; *People v. Ghebretensae*, *supra*, 222 Cal.App.4th at pp. 761–762.) However, a "trial court's discretion in imposing sentence is in no way limited by the terms of any negotiated pleas or sentences offered the defendant by the prosecution" and declined. (*Lewallen*, at p. 281.) A court may legitimately impose a more severe sentence if the evidence at trial reveals additional adverse information about the defendant or the crime than that which was known when the offer was made. (*Ibid.*) "Legitimate facts may come to the court's attention either through the personal observations of the judge during trial . . . or through the presentence report by the probation department, to induce the court to impose a sentence in excess of any recommended by the prosecution." (*Ibid.*) "The mere fact . . . that following trial defendant received a more severe sentence than he was offered during plea negotiations does not in itself support the inference that he was penalized for exercising his constitutional rights." (*People v. Szeto* (1981) 29 Cal.3d 20, 35.)

The People are correct that Babakitis has forfeited his retaliatory sentencing claim. The failure to object at trial to perceived vindictive sentencing results in a forfeiture of the issue on appeal. (*People v. Williams* (1998) 61 Cal.App.4th 649, 654–656; see generally *In re Seaton* (2004) 34 Cal.4th 193, 198–199.) Babakitis's citation to *People v. Scott* (1994) 9 Cal.4th 331, 354, to suggest "[t]rial counsel's request for a sentence less than that imposed by the trial court" was sufficient to preserve his objection, is unavailing. *Scott* held that an "unauthorized sentence" constitutes a narrow exception to the general requirement that only those claims properly raised and preserved

by the parties are reviewable on appeal; Babakitis's sentence was not unauthorized in the sense discussed in *Scott*. Nor did his *Romero* motion—which did not argue vindictiveness—suffice to preserve his argument. And *People v. Menchaca* (1983) 146 Cal.App.3d 1019, 1025—which addressed the defendant's right to an interpreter—does not hold that the forfeiture doctrine is inapplicable to constitutional claims. A constitutional claim, like any other, may be forfeited by the failure to object or assert it below. (*People v. Trujillo* (2015) 60 Cal.4th 850, 856; see *People v. Fortin* (2017) 12 Cal.App.5th 524, 531.)

Assuming arguendo the contention is properly before us, it fails on the merits. A claim of retaliatory sentencing must be supported by evidence that the trial court imposed the sentence based upon the defendant's exercise of his constitutional rights. There " 'must be some showing, properly before the appellate court, that the higher sentence was imposed as punishment for exercise of the right' " to trial. (*People v. Ghebretensae*, *supra*, 222 Cal.App.4th at p. 762; *People v. Angus* (1980) 114 Cal.App.3d 973, 989–990.) No such evidence exists here. Beyond the mere fact that the sentence the court ultimately imposed was higher than that offered pretrial, there is no indication whatsoever that the court's sentencing choices were meant to penalize Babakitis for going to trial. (See *People v. Szeto*, *supra*, 29 Cal.3d at p. 35; *People v. Ghebretensae*, at p. 762.)

There is no showing the trial court was aware of the first two offers, for 6 and 11 years, respectively. The disparity between the 14 year 4 month offer and the sentence imposed does not demonstrate vindictiveness. Both the trial evidence and the probation report revealed information that could legitimately have influenced the trial court's sentencing decisions. (See

Lewallen, *supra*, 23 Cal.3d at p. 281.) The court observed at sentencing that Babakitis endangered the deputies with his vehicle, placing them "in jeopardy of serious harm." The trial evidence also revealed Babakitis's prior run-ins with peace officers, including the instance in which he drove at an officer and led him on a high speed pursuit. The probation report detailed Babakitis's extensive criminal history. Contrary to Babakitis's argument, the fact the jury convicted him in count 1 of the lesser included offense of misdemeanor assault does not demonstrate the "facts learned by the trial court after trial were less egregious" than those known prior to trial. There is no showing the trial court was aware prior to trial of either the full evidentiary picture or the information in the probation report.

Babakitis insists that the trial court's pretrial comments "effectively amount[ed] to a promise that if [he] should lose at trial, he would receive a harsher sentence." This is not an accurate characterization of the trial court's statements. Nothing in the court's pre- or post-trial comments remotely suggested it was retaliating against him for exercising his right to go to trial. Pretrial, the court simply made the realistic observation that further settlement negotiations appeared futile in light of the fact the People were unlikely to re-offer the 14 year 4 month deal, which Babakitis in any event continued to reject. The court's comments at sentencing simply explained its rationale for the sentence imposed, which was based on legitimate factors. The prosecutor's request for a sentence that was one year less than that the court imposed does not suffice to demonstrate vindictiveness.

c. *The trial court did not abuse its discretion by denying Babakitis's* Romero *motion*

Babakitis also contends the trial court abused its discretion by denying his *Romero* motion. He is incorrect.

In the furtherance of justice, a trial court may strike or dismiss a prior conviction allegation. (§ 1385, subd. (a); *Romero*, *supra*, 13 Cal.4th at p. 504.) A court's ruling on a *Romero* motion is reviewed under the deferential abuse of discretion standard; that is, the defendant must show that the sentencing decision was irrational or arbitrary. (*People v. Carmony* (2004) 33 Cal.4th 367, 375, 377 (*Carmony*).) It is not enough to show that reasonable people might disagree about whether to strike a prior conviction. (*Id.* at p. 378.) The Three Strikes law "not only establishes a sentencing norm, it carefully circumscribes the trial court's power to depart from this norm . . . . [T]he law creates a strong presumption that any sentence that conforms to these sentencing norms is both rational and proper." (*Ibid.*) Only extraordinary circumstances justify a finding that a career criminal is outside the Three Strikes law. (*Ibid.*) Therefore, "the circumstances where no reasonable people could disagree that the criminal falls outside the spirit of the three strikes scheme must be even more extraordinary." (*Ibid.*)

When considering whether to strike prior conviction allegations, the factors a court considers are "whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted

of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

The record before us reveals no basis for concluding that, as a matter of law, Babakitis falls outside the spirit of the Three Strikes law. Babakitis's criminal history began decades ago and has continued unabated. In addition to the charged crimes and the convictions arising from the prior misconduct incidents, the probation report indicates that between 1986 and 2014, Babakitis was convicted of 14 misdemeanors, including receiving stolen property, possession of a concealed weapon, possession of or being under the influence of a controlled substance, resisting arrest, and several Vehicle Code violations. Between 1988 and 2006, he suffered eight felony convictions for burglary, possession of a controlled substance, possession of firearm by a felon, and possession or transport of a controlled substance for sale. His probation was revoked at least twice. When he committed the instant offenses, he was on post-release community supervision. In short, Babakitis's criminal history demonstrates he is "the kind of revolving-door career criminal for whom the Three Strikes law was devised." (*People v. Gaston* (1999) 74 Cal.App.4th 310, 320; *People v. Pearson* (2008) 165 Cal.App.4th 740, 749.)

Babakitis's arguments, advanced below and on appeal, do not persuade us any abuse of discretion occurred. That Babakitis's prior crimes were not violent is not dispositive. The fact a majority of the offenses were nonviolent "cannot, in and of itself, take [appellant] outside the spirit of the Three Strikes law when the defendant is a career criminal with a long and continuous criminal history." (*People v. Strong* (2001) 87 Cal.App.4th 328, 345.)

While Babakitis minimizes the circumstances of his strike offense, burglary carries a high risk of violence should the intruder and the property owner happen upon each other. " ' " 'Burglary laws are based primarily upon a recognition of the dangers to personal safety created by the usual burglary situation—the danger that the intruder will harm the occupants in attempting to perpetrate the intended crime or to escape and the danger that the occupants will in anger or panic react violently to the invasion, thereby inviting more violence.' " ' " (*Magness v. Superior Court* (2012) 54 Cal.4th 270, 275.) Babakitis is correct that the strike offense is remote in time, having been suffered in 1988. But remoteness has little mitigating force "where, as here, the defendant has led a continuous life of crime" after suffering the prior conviction. (*People v. Pearson*, *supra*, 165 Cal.App.4th at p. 749; *People v. Williams*, *supra*, 17 Cal.4th at p. 163; *People v. Humphrey* (1997) 58 Cal.App.4th 809, 813 [fact conviction was 20 years old was not a mitigating factor given defendant's recidivism; a trial court cannot be expected to "simply consult the Gregorian calendar with blinders on"].) Babakitis's age likewise does not compel a finding of abuse of discretion. "[M]iddle age, considered alone, does not remove a defendant from the spirit of the Three Strikes law. Otherwise, those criminals with the longest criminal records over the longest period of time would have a built-in argument that the very factor that takes them within the spirit of the Three Strikes law—a lengthy criminal career—has the inevitable consequence—middle age—that takes them outside the law's spirit." (*People v. Strong*, *supra*, 87 Cal.App.4th at p. 345.)

Babakitis's contention that his criminal record is a result of his drug problem is unavailing. "[D]rug addiction is not

necessarily regarded as a mitigating factor when a criminal defendant has a long-term problem and seems unwilling to pursue treatment." (*People v. Martinez* (1999) 71 Cal.App.4th 1502, 1511.) Babakitis's drug-related offenses date back to 1986, demonstrating that he failed to conquer his substance abuse issues over the almost three decades preceding the crimes. Moreover, Babakitis's criminal history demonstrates he has not been merely a drug user; he has been a drug dealer. The trial court was not obliged to view his substance abuse as a mitigating factor.

The trial court's comments at the hearing indicate it thoughtfully considered the relevant factors. "Where the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling . . . ." (*People v. Myers* (1999) 69 Cal.App.4th 305, 310.) Such is the case here.

d. *Senate Bill No. 1393*

The trial court imposed a five-year serious felony enhancement pursuant to section 667, subdivision (a)(1). Babakitis contends his sentence must be vacated and remanded to allow the trial court to exercise its discretion to strike or dismiss the conviction in light of recently enacted Senate Bill No. 1393. (2017—2018 Reg. Sess.) We agree.

When Babakitis was sentenced, imposition of a section 667, subdivision (a) serious felony enhancement was mandatory. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971.) Effective January 1, 2019, Senate Bill No. 1393 amended sections 667 and 1385 to allow a court to exercise its discretion to strike or dismiss a prior serious felony conviction for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1—2; *People v. Garcia*, at p. 971.) Senate Bill

No. 1393 applies retroactively to all cases that were not final when it took effect. (*People v. Garcia*, at p. 973.) Under *In re Estrada* (1965) 63 Cal.2d 740, we presume that, absent contrary evidence, an amendment reducing punishment for a crime applies retroactively to all nonfinal judgments. (*Id.* at p. 745; *People v. Brown* (2012) 54 Cal.4th 314, 323.) The *Estrada* rule has been applied to penalty enhancements, as well as to amendments giving the court discretion to impose a lesser penalty. (*People v. Nasalga* (1996) 12 Cal.4th 784, 792; *People v. Francis* (1969) 71 Cal.2d 66, 75—76.) Accordingly, we infer that the Legislature intended Senate Bill No. 1393 to apply to cases, like Babakitis's, that were not final on the legislation's effective date. (*People v. Garcia*, at p. 973.)

The People contend remand is unwarranted because the trial court's statements at sentencing indicate it would not have dismissed the enhancement in any event. We disagree. It is true that we "need not remand the instant matter if the record shows that the superior court 'would not . . . have exercised its discretion to lessen the sentence.' " (*People v. Johnson* (2019) 32 Cal.App.5th 26, 69.) However, remand is required "unless the record reveals a clear indication that the trial court would not have reduced the sentence even if at the time of sentencing it had the discretion to do so." (*People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110 [discussing resentencing under Sen. Bill No. 620].) We see nothing in the trial court's comments definitively demonstrating it would have imposed the enhancement had it possessed the discretion to strike it. In *People v. Johnson*, the trial court had not been "sympathetic" to the defendants at sentencing; nonetheless, *Johnson* rejected the argument that remand was unnecessary, explaining: "it is

undisputed that the court had no discretion, at [the time of sentencing], to strike the . . . serious prior felony enhancement, and neither defendant's trial counsel had the opportunity to argue the issues. The subsequently enacted laws provided the court with that discretion, greatly modifying the court's sentencing authority. Thus, even with the court's statements during sentencing, out of an abundance of caution, we remand this matter for resentencing to allow the superior court to consider" whether to strike the enhancement. (*People v. Johnson*, at p. 69.) We agree with *Johnson*'s reasoning. Accordingly, we vacate Babakitis's sentence and remand for resentencing, to allow the trial court to exercise its discretion and determine whether to strike or dismiss the section 667, subdivision (a)(1) serious felony enhancement. We offer no opinion on how the trial court's discretion should be exercised.

e. *Correction of the abstract of judgment*

The abstract of judgment incorrectly indicates Babakitis was convicted of counts 2, 3, and 4 by plea; in fact, he was convicted by the jury on these counts. The parties agree that this error must be corrected. Because we are vacating Babakitis's sentence and remanding for resentencing, we direct that this error be corrected when the trial court issues a new abstract of judgment upon resentencing.

DISPOSITION

Babakitis's sentence is vacated and the matter is remanded to allow the trial court to exercise its discretion and determine whether to strike or dismiss the section 667, subdivision (a)(1) serious felony enhancement. The new abstract of judgment prepared upon resentencing shall reflect that conviction on counts 2, 3, and 4 was by jury. In all other respects, the judgment is affirmed. The petition for writ of habeas corpus is denied.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

EGERTON, J.

MURILLO, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.